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SUPREME COURT NUMBER _____

Supreme Court, U.S.

FILED

MAY 10 1988

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1987 -TERM

RANDY KELLY,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER KNIGHT
ATTORNEY FOR THE PETITIONER
255 SAINT FRANCIS STREET
MOBILE, ALABAMA 36602
205/432-0457



QUESTIONS PRESENTED

I. Did search of the trailer where Petitioner was found with cannabis contravene Petitioner's Fourth and Fourteenth amendment right to be free from unreasonable searches and seizures when based upon a search warrant affidavit lacking proof of an alleged confidential informant's reliability and lacking detailed information from which the magistrate could conclude that there was a substantial basis for the determination that there was probable cause to issue a search warrant?



LIST OF PARTIES

The parties to this proceeding
are the Petitioner, Randy Kelly,
and the State of Alabama.



TABLE OF CONTENTS

	<u>PAGE</u>
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS DELIVERED IN COURTS BELOW	vi
GROUND ON WHICH THE JURISDIC- TION OF THE SUPREME COURT IS INVOKED	vi
CONSTITUTIONAL PROVISIONS AND STATUTES	viii
STATEMENT OF THE CASE	1
ARGUMENT	9
CERTIFICATE OF SERVICE	18
APPENDIX	A-1



TABLE OF AUTHORITIES

<u>CASE LAW</u>	<u>PAGE</u>
<u>Aguilar v. Texas</u> , 378 U.S. 108 (1964)	7,9,10
<u>Jones v. United States</u> , 362 U.S. 257, 271 (1960). 11	
<u>Kelly v. State</u> , 519 So.2d 1384 (Ala. Crim.App., 1987)	vi
<u>Illinois v. Gates</u> , 462 U.S. 213 (1983)	7,9,10,11 13,17
<u>Massachusetts v. Sheppard</u> , 468 U.S. 981 (1984)	13,16,17
<u>Nathanson v. United States</u> , 290 U.S. 41 (1933)	10
<u>Spinelli v. United States</u> , 393 U.S. 410 (1969)	9
<u>State v. Adkins</u> , W.Va._____, 346 S.E. 2d 762 (1986)	15
<u>State v. Huft</u> , 106 Wash. 2d 206 (1986). 15	
<u>United States v. Barrington</u> , 806 F.2d 529 (5th Cir. 1986)	15
<u>United States v. Leon</u> , 468 U.S. 897 (1984)	13,14,15, 16



CONSTITUTIONAL PROVISIONS
AND STATUTES

U.S. CONST. Amend. IV	i, viii 9, 17
U.S. CONST. Amend. XIV	i, viii 9, 17
<u>28 U.S.C. §1257</u>	vi
Code of Alabama, 1975	
§20-2-80	ix, 1



OPINIONS DELIVERED IN COURTS BELOW

The Alabama Court of Criminal Appeals affirmed Petitioner's conviction without opinion. Kelly v. State, 519 So.2d 1384 (Ala.Crim.App., 1987) (table). The Court also denied rehearing without opinion. Id. at 1384. The Alabama Supreme Court denied certiorari without opinion.

GROUND ON WHICH THE JURISDICTION
OF THE SUPREME COURT IS INVOKED

The Petitioner seeks review of the decision of the Alabama Court of Criminal Appeals dated November 24, 1987, affirming his conviction, and the decision of the Alabama Supreme Court dated March 11, 1988, denying his petition for a writ of certiorari, and invokes the jurisdiction of the Supreme Court under 28 U.S.C. §1257,



which provides for review by writ of certiorari by the Supreme Court of final judgments or decrees rendered by the highest court of a state in which a decision may be had, where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties in statutes of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CODE OF ALABAMA, 1975, §20-2-80

TRAFFICKING IN CANNABIS, COCAINE, ETC:
MANDATORY MINIMUM TERMS OF IMPRISONMENT: TRAFFICKING IN ILLEGAL DRUGS:
HABITUAL FELONY OFFENDER ACT.

Except as authorized in chapter 2,
Title 20:



(1) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of one kilo or 2.2 pounds of cannabis is guilty of a felony, which felony shall be known as "trafficking in cannabis." If the quantity of cannabis involved.

a. Is in excess of one kilo or 2.2 pounds, but less than 100 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years and to pay a fine of \$25,000.00.

b. Is 100 pounds or more, but less than 500 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of five calendar years and to pay a fine of \$50,000.00.



c. Is 500 pounds or more, but less than 1,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of \$200,000.00.

d. Is 1,000 pounds or more, such person shall be sentenced to a mandatory term of imprisonment of life without parole.



STATEMENT OF THE CASE

Randy Kelly, the Petitioner, was indicted on July 31, 1986, for trafficking in marijuana in violation of Code of Alabama, 1975, 20-2-80. Mr. Kelly was convicted and sentenced to fifteen (15) years in the state penitentiary. Having unsuccessfully appealed to the Alabama Court of Criminal Appeals and having unsuccessfully petitioned for certiorari in the Alabama Supreme Court, he now seeks review by certiorari in this Court.

Mr. Kelly was arrested during the execution of a warrant authorizing the search of his brother's residence, a trailer, in Bon Secour, Alabama. The warrant was issued and executed on the

same day. (R. 38, 44). The affidavit in support of the search warrant is set out verbatim infra at p. A- 3.

Deputy Lance Monley, who secured the warrant, participated in the execution thereof at the suspected residence. Investigator Walter Crook testified that when he arrived at the scene, he saw Mr. Kelly near a garbage dump throwing something, but did not see what it was. (R. 10). He, Monley, and other officers first searched the trailer, wherein they seized \$1,412.00 from a shirt worn by one Terry Kelly, \$725.00 in a cup on a stereo in the living room, \$500.00 in a living room cushion, \$1,000.00 under a bedroom mattress, a pair of scales from a kitchen food closet, a bag containing "roaches," seeds from the living room



coffee table, and \$965.00 in currency from the Petitioner's person. The officers found marijuana in a bag outside the trailer after the search of the trailer. (R. 51). There was no evidence indicating that the Petitioner actually resided at the trailer. (R. 32, 33, 71, 72).

The evidence was contradictory as to whether Mr. Kelly claimed ownership of any of the marijuana. Officer Monley recalled that Kelly confessed co-ownership of the marijuana found in the bag outside the trailer with his brother (R. 53, 54); but Mr. Kelly denied claiming ownership except to prevent the police from arresting his brother's wife. (R. 111).

The affidavit in support of the search warrant stated that the affiant

had talked to a "reliable informant" whose information had "proven reliable in the past." (Appendix infra, p. A-3). The affiant stated that during the past 72 hours the informant had seen marijuana at the residence and that "he (the informant) has been at said residence when marijuana was being sold. (Appendix, infra, p. A-4). The affidavit gave detailed directions on how to find the residence.

A total of 4.9365 pounds of marijuana was seized from the trailer and surrounding grounds, which is within the statutorily-proscribed amount. (R. 97-102).

Counsel for the Petitioner at trial objected to the search warrant in the following manner:



"Basically, Judge, that search warrant is one that's a standard and has bare bones in it. It has no real information.

That kind of search warrant is invalid in that it simply makes bare conclusions of fact. It is bare conclusions of law, does not give the Magistrate or the Judge who issues that warrant sufficient information from which to base information as to whether or not to grant that warrant.

He just makes mere conclusions and does not give any information as to how that information came about as to the trustworthiness of his informant.

It is simply just a bare-bones warrant which has been found by the Court to be an illegal search

warrant.

Your Honor, I know we're not relying on the two-prong test anymore and I realize it's a general situation as to the reliability of the informant.

However, he does not give any information whatsoever to the Court as to the backgrounds of the informant and to why he is reliable.

He simply says he is reliable and there are no grounds for it. It's a bare-bone conclusion of fact."

The Court: "Well, it says, 'has been reliable in the past.'"

Mr. Cherry: "Right, but not whether he's made any arrests or had convictions out of that.

It's just a bare-bones conclusion."

The Court: "Overrule the objection."

In the Alabama Court of Criminal



Appeals, in his initial brief, at page 4, counsel raised the issue as follows:

II. WHETHER THE AFFIDAVIT AND INFORMATION PRESENTED TO THE ISSUING JUDGE BY THE ARRESTING OFFICER WAS SUFFICIENT TO PROVIDE PROBABLE CAUSE FOR A SEARCH WARRANT IN THE PRESENT CASE.

In the body of his brief, counsel cited Illinois v. Gates, 462 U.S. 213 (1983) and relied on this case and Aguilar v. Texas, 378 U.S. 108 (1964) in support of his argument on this point.

In his Petition For Certiorari in the Alabama Supreme Court, counsel averred that the decision of the Alabama Court of Criminal Appeals was in conflict with its prior decisions in its holding that the search warrant affidavit was sufficient to provide



probable cause for issuance of a search warrant. In brief counsel argued in precisely the same manner as he did in the Court of Criminal Appeals.



ARGUMENT

I.

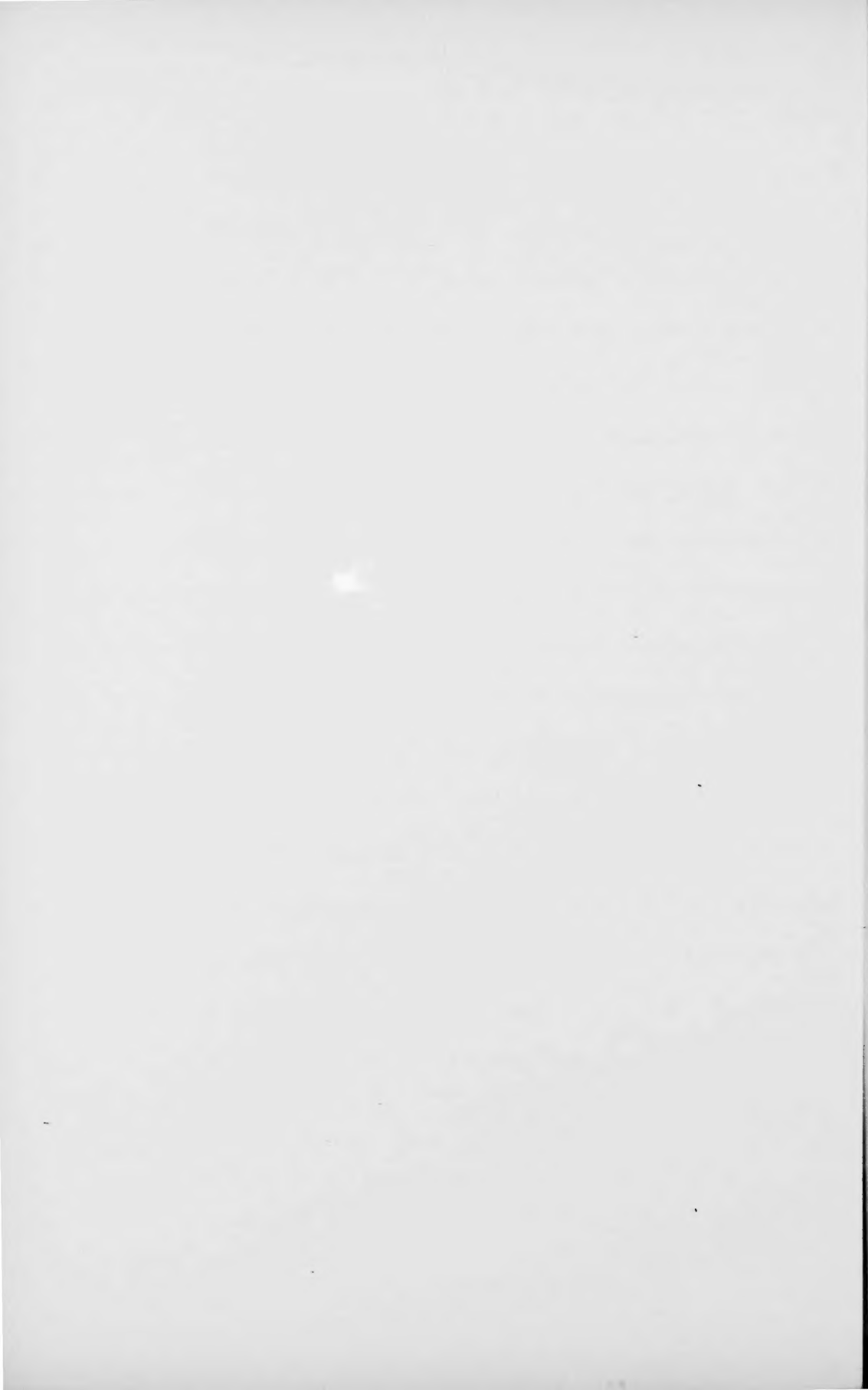
Illinois v. Gates, 462 U.S. 213 (1983) control the Court's determination of the question presented herein. In Gates, the Court abandoned the then existing Aguillar-Spinelli,^{1/} two - pronged test for testing the sufficiency of a search warrant affidavit in supporting the probable cause determination necessary under the fourth and fourteenth amendments. The Court, however, continued its condemnation of "bare bones" affidavits in support of search warrants and required that the affidavit provide the magistrate with a "substantial basis for determining the existence of probable cause." Illinois v. Gates,

^{1/}Aguillar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).



462 U.S. at 239. The Court gave two examples of inadequate affidavits, to-wit: Nathanson v. United States, 290 U.S. 41 (1933), wherein the affiant stated that he "has cause to suspect and does believe" that illegal liquor was located on certain premises; and Aguillar v. Texas, 378 U.S. 108 (1964), wherein the officer stated that "[a]ffiants have received reliable information from a credible person and do believe" that heroin was stored in a home. These conclusory statements gave the magistrate "no basis at all for making a determination of probable cause." Gates, at 462 U.S. 239. The action of the magistrate cannot be a "mere ratification of the bare conclusions of others." Gates, 462 U.S. at 239.

Moreover, the Court in Illinois



v. Gates, 462 U.S. 239 (1983) stated that the informant's "veracity," "reliability," and "basis of knowledge" were still to be understood as closely intertwined issues that may usefully illuminate the common sense, practical question whether there is probable cause to believe there is a "fair probability" of the existence of contraband at a particular location.

In applying the Gates standard to the facts in question, the reviewing Court must determine whether the magistrate had a "substantial basis for concluding that probable cause existed." Illinois v. Gates, 462 U.S. 213, 238; citing Jones v. United States, 362 U.S. 257, 271 (1960). Initially, it is significant here that on the issues of "veracity" and "reliability" the affidavit is



certainly no more than conclusory. The affiant merely states that a "reliable informant whose information has proved reliable in the past" has furnished the information. The basis of his knowledge appears to be his presence in the residence within the last 72 hours and his observation of marijuana therein. He does not state a time at which he observed marijuana being sold in the residence.

The magistrate in this case did not have a substantial basis for concluding that someone whom the affiant claimed in a conclusory fashion to be reliable had actually seen marijuana on the premises, and hence that marijuana was, indeed on the premises. Under the totality of the circumstances, there was insufficient

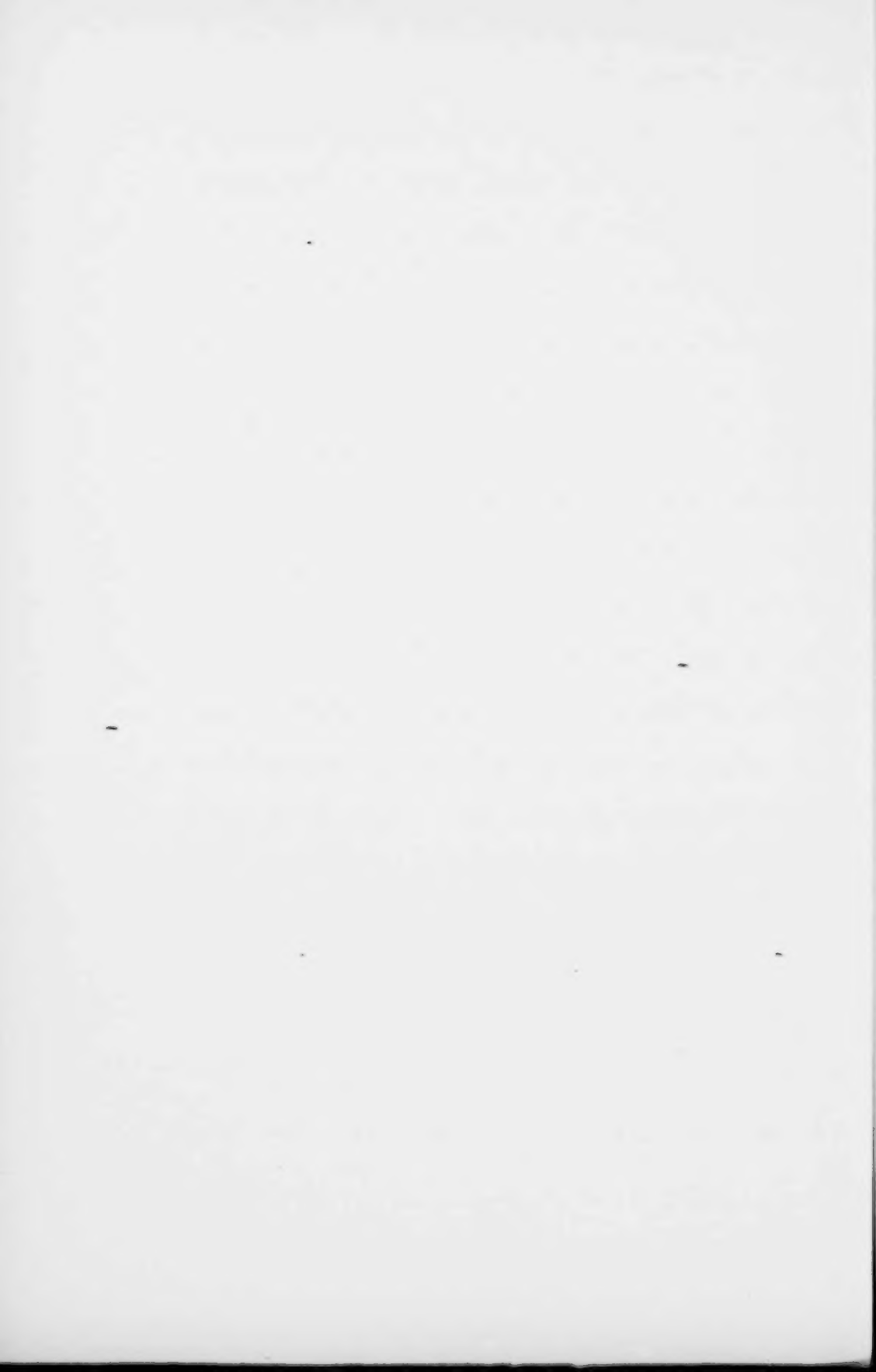


evidence from the affiant upon which the magistrate could make a practical, common-sense determination that marijuana was on the premises.

Since the affiant in this case did not provide a substantial basis for a determination of probable cause, it is invalid under Gates. The inquiry must nevertheless be made whether the search was valid because executed in good faith by police officers in reliance upon the probable cause determination of the magistrate. United States v. Leon, 468 U.S. 897 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984). The conclusion in this case must be in the negative. Initially, Leon and Sheppard cannot be read as automatically validating conclusory affidavits, the likes of which Illinois v. Gates, supra,



has decried. The Court in Leon, supra, recognized that a case-by-case determination must be made as to whether the purpose of the exclusionary rule is being furthered by suppression of evidence. The Court concluded that under the particular facts of the case, the evidence should not be excluded on account of the magistrate's erroneous probable cause determination because the affidavit related the results of an extensive investigation and provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. There is certainly no evidence in this case of any type of extensive investigation. Nor was sufficient evidence provided by the affiant to create a disagreement among competent judges as to the



existence of probable cause.

A number of state and federal courts have held that the Leon decision does not apply to "bare-bones" affidavits. For example, United States v. Barrington, 806 F.2d 529 (5th Cir. 1986) held Leon inapplicable to an affidavit in which the affiant "received information from a confidential informant . . . known to Captain Phil Solomon and has provided information in the past that has led to arrest and convictions." In State v. Adkins, ____ W.Va. ____, 346 S.E.2d 762 (1986), the affidavit asserted that a confidential informant observed marijuana inside the premises. Leon was held inapplicable to this bare-bones affidavit. A similar result was reached in State v. Huft, 106 Wash.2d 206, (1986, where informant's

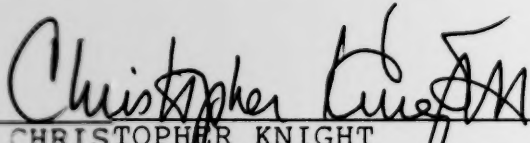
track record and basis of knowledge were only corroborated in a limited manner. See also, Ex parte State, 476 So.2d 632 (Ala. 1985).

Nor does the holding under the facts in Massachussetts v. Sheppard, 468 U.S. 981 (1984) support the conclusory affidavit in this case. In Sheppard, the Court upheld the seizure of murder case evidence under a warrant authorizing seizure of illegal controlled substances because the police acted in good faith reliance on a magistrate's determination of probable cause. This case is factually inapposite. The affiant in this case provided only conclusory averments of informant reliability upon which there was no substantial basis for the magistrate's determination of probable cause. The Court in Leon,



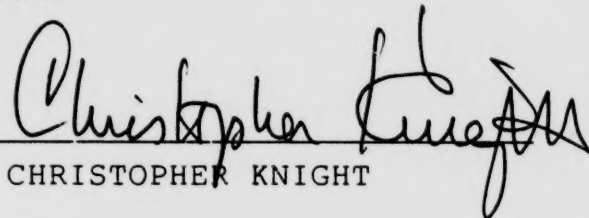
supra, and Sheppard, supra assuredly did not intend its recent decriance of conclusory affidavits in Illinois v. Gates, 462 U.S. 213 (1983), to be but a passing fancy.

Because there was no substantial basis in this case for the magistrate's determination of probable cause, the resultant search and seizure of the contraband upon which the conviction of Mr. Kelly was primarily based were due to be declared invalid under the Fourth and Fourteenth Amendments. The Court should abide by its condemnation in Illinois v. Gates, 462 U.S. 213 (1983), of conclusory affidavits in support of search warrants and reverse Mr. Kelly's conviction.


CHRISTOPHER KNIGHT
Attorney for Petitioner

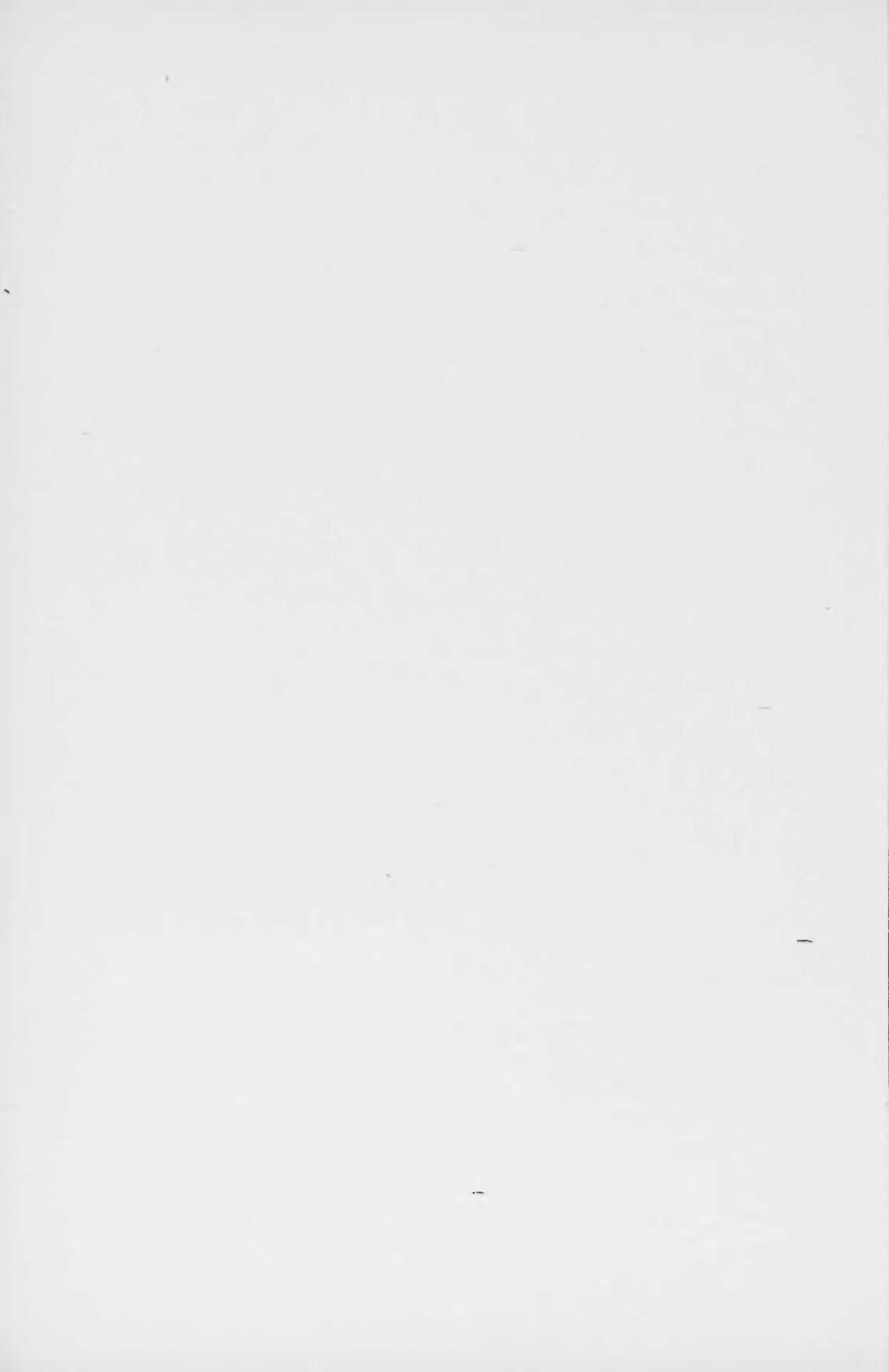
CERTIFICATE OF SERVICE

I, Christopher Knight, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have served three (3) copies of this Petition for a Writ of Certiorari on the Honorable Don Siegelman, Attorney General of Alabama, by depositing same in the United States mail, properly addressed and first class postage prepaid on this the 10th day of May, 1988.


CHRISTOPHER KNIGHT



APPENDIX



COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

1st Div. 577 Baldwin Circuit Court
CC 86-434

RANDY KELLY,
Appellant,

vs.

STATE OF ALABAMA,
Appellee.

Dear Sir:

You are hereby notified that
on November 24, 1987 the following
indicated action was taken in the
above - styled cause by the Court of
Criminal Appeals of Alabama:

xxx Affirmed on appeal. No opinion.
Judgment not final, see Rules 40
and 41, A.R.A.P.

original signed
Mollie Jordan
Clerk
Court of Criminal Appeals
Of Alabama



THE STATE OF ALABAMA--

JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

March 11, 1988

87-430

EX PARTE: RANDY KELLY

PETITION FOR WRIT OF CERTIORARI

(Re: Randy Kelly v. State)

CCA 1/577

CERTIFICATE OF JUDGMENT

WRIT DENIED

The above cause having been
duly submitted, IT IS CONSIDERED
AND ORDERED that the petition for
writ of certiorari be denied.

Costs taxed to petitioner.

ALMON, J. - TORBERT, CJ., MADDOX,
BEATTY AND HOUSTON, JJ., CONCUR.



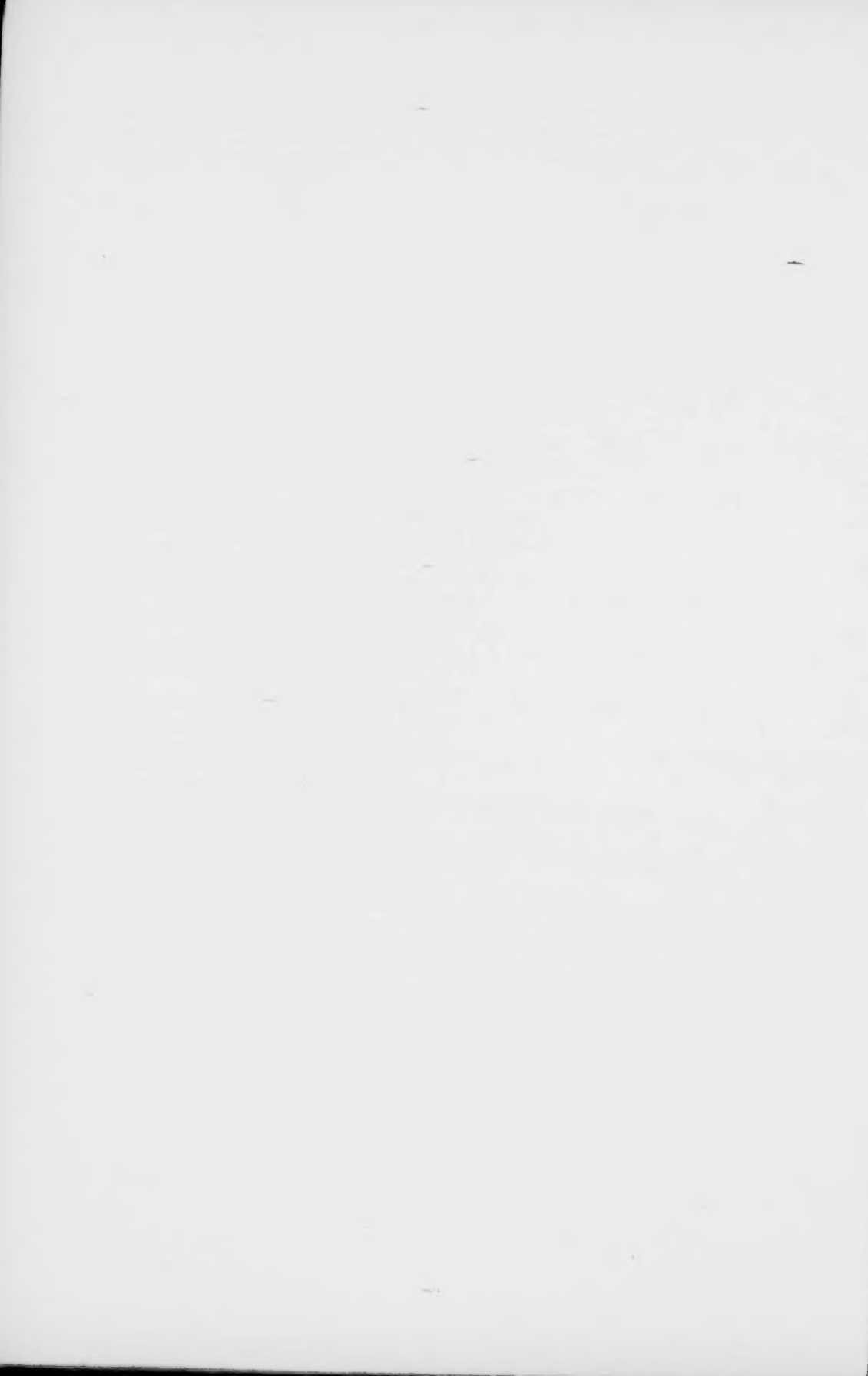
AFFIDAVIT AND WRIT FOR SEARCH WARRANT

STATE OF ALABAMA)
)
Baldwin County)

Before me Charles C. Partin personally appeared Lance Monley who, being duly sworn, deposes and says: that he (has reason to believe that on the premises known as) See directions below * to residence (trailer) and curtilage thereof in or near Bon Secour, Baldwin County, Alabama.

There is now being concealed certain property, namely marijuana which is contraband enumerate under Title 20 of the Alabama Controlled Substance Act.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: a reliable informant whose information has proven reliable



in the past has furnished this Investigator with this information: At the above stated residence there is now being kept marijuana. Informant further states that he has seen marijuana at the residence within the past 72 hours. Informant also states that he has been at the said residence when marijuana was being sold.

* DIRECTIONS: Travel highway 59 south of Foley to County road 6 turn west on county road 6 and travel approximately 8 tenths of a mile to the first dirt road to the left headed south. Next to dirt road will be a Gulf Telephone pedestal with the markings A -17 located on the same of roadway there at dirt road and county road 6. Travel dirt road to the first mobile home residence located on the right (or on the west) side



of roadway. Trailer will be sitting just off of roadway in a north and south position on property. Mobile home will be light brown or tan in color.

original signed

Lance Monley, B.C.S.D.

Sworn to and subscribed

before me this 20 day

of June, 1986.

original signed

Charles C. Partin

Signature of Judge

SEARCH WARRANT

The State of Alabama, Baldwin County:

TO ANY SHERIFF OR ANY CONSTABLE

OF SAID COUNTY:

Proof by Affidavit having been made this day before me, by Lance Monley that (he has reason to believe that on the premises known as see



directions attached hereto* to residence
(trailer) and curlitage thereof in
or near Bon Secour Baldwin County,
Alabama. There is now being concealed
certain property, namely Marijuana
which is contraband enumerated under
Title 20 of the Alabama Controlled
Substance Act.

You are hereby commanded, in
the anytime to make immediate search
on the premises known as see directions*
attached hereto for the following
property: Marijuana And if you find the
same or any part thereof, to bring
it forthwith before me, at my office
at _____.

Dated the 20th day of June, 1986.

original signed

Charles C. Partin
Circuit Judge